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SUBJECT: FRANCE'S DIGITAL COPYRIGHT BILL: SENATE VOTES TO SOFTEN
INTEROPERABILITY BUT LOW PENALTIES REMAIN UNCHANGED

REF. PARIS 01847

[1](#)1. This is an action request. See paragraph 13

[1](#)2. (SBU) SUMMARY. The French Senate approved in the early hours of May 11 the GOF draft law on digital copyright, in a format which leaves unchanged the National Assembly's decriminalized penalty regime, the principle (if not the requirement) of interoperability, and the so-called "Vivendi Universal Amendment" criminalizing peer-to-peer software publishing. The draft law adopted by the Senate largely takes the sting out of interoperability by laying out general guidelines -- which no longer require Digital Rights Management (DRM) vendors to divulge industrial secrets to their competitors -- and creating a new independent authority to decide on the scope of interoperability and the "right to the exception for private copy." The newly adopted text, known as the Law on Author's Rights and Related Rights in the Information Society, generally abbreviated as DADVSI in French is a step that would bring France in line with the 2001 EU Digital Copyright Directive. Over the next month, the text will likely go to a reconciliation conference at the end of the month, and be signed into law before the summer. END SUMMARY.

Senate Approval And Next Steps

[1](#)3. (SBU) The DADVSI draft law was adopted by the French upper house on May 11, with 164 votes in favor, 128 against, and 37 abstentions. All the votes in favor came from representatives of the right of center government UMP party. The text will now go before a joint committee of both houses of the French Parliament to be reconciled, and for final approval under the current Government "fast-track" emergency procedure, which requires only one reading by both houses. Upon completion of the legislative procedure, the draft bill will be submitted to President Jacques Chirac for signature some time before the summer. France, which had tabled implementing legislation in November 2003, is the last country, with Spain, to transpose the EU Copyright Directive.

Exceptions to Exclusive Copyrights:

[1](#)4. (SBU) Exceptions to exclusive copyrights, for public libraries and archives, will now have to fulfil the "three-step test," i.e. that they be confined to special cases, not conflict with a normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the right holder. Education and research have been added to the restrictive lists of exceptions in the Senate, following the threat of a campaign of civil disobedience "in any way they deemed useful and relevant" by over 2000 members of the French scientific community.

[1](#)5. (SBU) The more traditional exception for private copy, an essential feature of French "droit d'auteur," which allows French residents to freely make copies of works (except software) for their private use (and that of their family and friends) has also been refreshed. The number of copies allowed as part of that exception will now be decided by a new high regulatory authority, in charge of outlining the contours of the private copy exception as well as the new interoperability principle. The new authority will also work hand-in-hand with the already existing Copyright Commission, which sets the rates and conditions for the "tax on private copy" meant to address the losses incurred by copyright holders. This tax is levied on blank media (audio and video cassettes, CD, DVD, as well as memory and hard drives in portable media players). While most of this tax goes to rightholders, a quarter of it, representing some 40 million euros a year (USD 50 million), is used to finance cultural events and festivals throughout France.

Penalties Remain Unchanged

[1](#)6. (SBU) The system of "gradual sanctions", i.e. decriminalized fines, has been confirmed by the Senate as "fair and balanced" -- despite efforts by one Senator and former Minister of Trade and Industry, Gerard Longuet, to switch from what he described as "organized indifference" to stiffer sentences. Culture Minister Donnedieu de Vabres reiterated on this occasion that the purpose of the bill was not to go after offenders but to ensure the protection of works. As a result, non-commercial downloads are subject to the

lowest fine in France's Penal Code (38 euros), the equivalent of a traffic ticket, instead of the original three years' imprisonment and 300,000 euro fine proposed earlier by the GOF. These heavy penalties in the first GOF draft bill created a major outburst in the National Assembly, eventually leading to the adoption of the radical "global licence." In the words of one Socialist and technologically savvy member of the National Assembly, it would be wrong "to describe the eight million people who have downloaded music from the Internet as delinquents." On May 11, the Culture Minister announced that an "index" of all protected works would be set up to enforce the three goals of the bill: respect of copyright, private copy and interoperability.

Softening Interoperability

17. (SBU) The Senate has proposed largely weakening the National Assembly's radical ideas on the DRM technology. Two amendments in the National Assembly's version had stated that providers of DRM systems should provide the necessary technical documentation to ANY party needing it to ensure that interoperability, including the source code. This was interpreted as a direct attack on Apple's iTunes platform and their iPod players.

18. (SBU) In press statements, Apple said that the French copyright law amounted to "state-sponsored piracy" and that it would pull its business out of France. This declaration had an unfortunate impact. It heartened claims by free-software advocates and politicians who said that the opening up of DRM would benefit makers of DRM systems by enabling them to prosecute competitors as facilitating piracy. U.S. Secretary of Commerce Carlos Gutierrez's press comments saying that while he needed to take a look at the legislation, he supported protecting intellectual property rights were widely interpreted to be supportive of Apple, and French pro-interoperability groups reacted disapprovingly. The Odebi League, a citizen's action group defending the rights of Internet users, told Apple to "mind its business and not meddle into the French legislative process" and pointed out that "if Apple wishes to do business in France, it has to respect the rights that the French enjoy." Some senators said they regretted that Apple did not appeal to them directly and interpreted it as a lack of interest.

Creating A New Regulatory Authority

19. (SBU) The Senate bill proposes a new regulatory authority to examine the question of private copies and interoperability. This new seven-member High Authority, modelled along the lines of France's independent regulatory bodies in the electricity and gas sectors (CREG), and in the telecoms and electronic commerce sector (ARCEP), replaces the much-decried "college of mediators" initiated by the National Assembly. Its responsibilities, much like its guidelines, have been left as open as possible to allow for the fast pace of technological change. At the same time, prodded by embattled Culture Minister Donnedieu de Vabre and Villepin administration, the Senate Cultural Affairs Committee developed a text designed to meet as little opposition as possible from the National Assembly once in the joint committee for conciliation. These considerations explain the current text's willingness to pass the difficult decisions on to the new authority.

Previous Support For Interoperability and Copying

10. (SBU) Public discussion of DRM and its effect on the private copy exception have been particularly vivid in France. French consumer associations initiated and often won court cases where DRM restricted private copying -- a sacrosanct exception under French copyright law.

Over the past three years, French consumer organizations have initiated a number of court cases dealing with complaints of consumers about CDs and DVDs that could not be copied and ripped because of technical protection measures in place. In dealing with the cases, French courts had developed the argument that the ability to play a CD or a DVD on different devices constituted an essential characteristic of a CD or DVD, and that producers of such devices could be held liable for misleading the consumer in case of incompatibilities. This first step towards establishing the right to interoperability was confirmed earlier this year, when a Paris Court of Appeals concluded that DRMs must respect the private copy exception.

NEXT STEPS

11. (SBU) Next steps include the drafting of implementing regulations, which would also give the GOF (and stakeholders) an opportunity to tweak the legislation, particularly regarding penalties and sentencing. This is expected to take place over the summer. The GOF will draft and implement these by decree. Other possibilities for modification, according to lawyers, include a constitutional challenge, which could come on any number of articles. We understand that the Commission will eventually examine all the EU member-states' transpositions of the directive at some point over the next year. Finally, the GOF notes that the law has a "review clause" of 18 months, requiring the government to provide the Parliament with an evaluation of its efficacy.

COMMENT AND ACTION REQUEST

¶12. (SBU). France is one of the last countries to fulfil its obligation to transpose this 2002 EU Directive. In making only a minimal effort, many Senators seemed to be acknowledging how quickly technology had moved since then 2002, and during the debates, French Parliamentarians underscored the irony of a belated implementation of a directive which the EU Commission is reportedly already in the process of re-examining. In our conversations over the last weeks where we raised our serious concerns over the quality and direction of this controversial bill, French government officials and observers had sought to reassure us and other stakeholders. We were told (see reftels) that the Senate version would address many if not most of industry's concerns. Senate legislative staff was thought more pro-business, more technologically savvy, and less ideological. Industry observers, many of whom were involved in a low-profile but intense effort to reshape the bill with key amendments were optimistic as well. Working with French industry allies, they proposed close to 300 amendments. However, with the President and Prime Minister under political siege, the government and the majority party were in a hurry to get this complicated and troublesome bill off their to-do list. By placing the bill on a legislative fast-track, the government could be assured that the conciliation conference would be over quickly. This political pressure resulted in some improvements, such as interoperability, where industry analysts are somewhat relieved at the results, but a number of crucial elements remain unchanged, notably the lack of deterrent penalties.

¶13. (SBU) COMMENT AND ACTION REQUEST. The next six months will provide some limited opportunities to fine-tune the bill, notably in the drafting of implementing regulations, which the GOF can issue by decree. Other options would be to raise examination of the legislation in light of other EU member state transpositions as well as WIPO and TRIPS commitments. Post would appreciate Washington's cleared interagency guidance, including any legal analysis regarding the legislation's impact. End Comment.

Stapleton